United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan
(AB-2001-2)

Statement of the United States at the Oral Hearing

June 1, 2001

1. Thank you Mr. Chairman, members of the Division. The United States is pleased to have this opportunity to appear before you today to address the issues in this dispute.

2. Thank you, Mr. Chairman and members of the Division.

3. **Japan's argument with respect to the "all others rate"** (at ¶ 8) is the same as the rationale that the Panel employed (at ¶ 7.89). The argument is that, when Article 9.4 refers to margins "established under the circumstances of" the facts available rule, it really means margins "calculated using <u>any element</u> of facts available, no matter how insignificant and regardless of whether those facts are adverse to the respondent or are neutral." If this was what the Members had intended, it would have been a simple matter to have provided this explicitly in Article 9.4. But they did not, and neither Japan nor the Panel has demonstrated that its preferred interpretation of "established" is the only permissible interpretation.

4. Japan attempts to get around this difficulty by distorting the U.S. submission in several respects.

5. First, Japan claims (at ¶ 15) that the U.S. interpretation of Article 9.4 reads the words "under the circumstances referred to" out of that provision. This is completely untrue. The Shorter Oxford English Dictionary defines "circumstance" as "that which stands around or

surrounds" or "the material, logical, or other environmental conditions of an act or event . . . ." Accordingly, when Article 9.4 refers to margins "established under the circumstances of" the facts available rule, it refers to margins "founded" or "set up" "surrounded" by the "environmental conditions" of facts available. This is perfectly consistent with the United States' interpretation – margins based primarily on a respondent's reported data and reflecting only a small element of facts available cannot reasonably be said to have been set up in the "environmental conditions" of the facts available rule. Japan's interpretation, and the Panel's, would be equivalent to characterizing an overwhelmingly sunny day in which there was a single, brief shower as a "rainy" day.

6. Second, Japan implies (at ¶ 20) that the United States incorporates dumping margins based overwhelmingly on facts available within "all others" rates. This is incorrect. The Department's longstanding practice is to reject submissions that are so inaccurate or incomplete that they do not constitute a reliable basis on which to calculate dumping margins. The Department bases the margins for such companies entirely on the facts available, and it excludes those margins from the calculation of the all-others rate. Thus, contrary to Japan's suggestion, *there are no cases* in which the inclusion of a token amount of data has led to the use of a margin based overwhelmingly on facts available in determining the all-others rate. Nor could there be any such cases consistent with the Department's current practice.

7. Third, the United States has stressed that the Panel's and Japan's interpretation of Article 9.4 will make an "all others" rate impossible to calculate in many instances. Japan claims (at ¶ 26) that this problem is the result of the impermissibly "aggressive" use of facts available by the United States. Japan's claim is wrong. First, if an authority uses facts available in an

impermissible manner, the proper remedy is to disallow that particular application under Article 6.8 of the Agreement, not to re-write Article 9.4. Second, Japan's argument ignores that it is frequently not possible to avoid using neutral facts available to fill gaps in submissions. Under Japan's approach, it would be impossible to determine all-others rates in these cases. The EC makes this point in its third party submission (at ¶¶ 9-15).

8. I will now turn to the Department's **arm's-length or "99.5%" test**. The test is designed to remove from normal value certain sales that are outside the ordinary course of trade -- sales made to affiliates at preferential prices. This protects the normal value calculation from being "skewed downward" by below arm's-length pricing.

9. Although the Panel recognized the legitimacy of analyzing pricing patterns to determine whether home market sales were in the ordinary course of trade (at ¶ 7.109), it rejected the Department's test (at ¶ 7.110) because that one test did not identify all sales potentially outside the ordinary course of trade, including both high-priced sales and sales at below arm's-length prices. Article 2, however, does not require every test employed by an investigating authority to identify sales outside the ordinary course of trade to address both high and low-priced sales. Article 2.2.1 provides for the elimination, as "not being in the ordinary course of trade," of sales *below* cost, *but not sales above cost*. Thus, Article 2 itself contradicts the Panel's incorrect assumption that any test which focuses on sales at below-arm's-length prices is impermissible.

10. Japan claims to be concerned that the 99.5 percent test does not address sales made to affiliates outside the ordinary course of trade at higher-than-market prices (at ¶¶ 37-38; cf. Panel Rep. at ¶ 7.110). This argument is a red herring. Not a single respondent claimed during the

investigation that its higher-than-market priced sales to affiliates were outside the ordinary course of trade.

11. One reason why sales to affiliates at below-arm's-length prices might be outside the ordinary course of trade is that they may have been priced that way to lower normal value. There is no such obvious reason to presume that high-priced sales to affiliates are outside the ordinary course of trade. More importantly, if high-priced sales are outside the ordinary course of trade, only respondents will possess the information demonstrating this to be the case. Respondents have an incentive to provide this information to an investigating authority because it tends to reduce dumping margins. Therefore, it is perfectly appropriate to require respondents to demonstrate that high-priced sales to affiliates are outside the ordinary course of trade.

12. Japan notes (at ¶ 37, n.34) that "it is a basic tenet of free-market economics that companies are not in business to lose money." We agree. It follows that companies are not in business to sell consistently for less than the market is willing to pay. Therefore, when sales to affiliates are made consistently at below-arm's-length prices, they are *inherently* unreliable as "not being in the ordinary course of trade," for reasons that higher-priced sales are not.

13. I will now turn to the U.S. decision to base normal value on **sales through affiliates of the producer**, instead of on the initial transfer to the affiliate at preferential prices. Japan (at ¶ 44), like the Panel (at ¶ 7.113), largely ignores that the use of these sales is perfectly consistent with the text of Article 2.1. Simply put, sales made through affiliates to unaffilitated customers are sales of the like product, in the ordinary course of trade, for consumption in the exporting country.

14. Article 2.2 reinforces this straightforward interpretation of Article 2.1. It states that normal value may be based on third-country sales prices or on constructed value only "when there are *no sales* of the like product in the ordinary course of trade in the domestic market of the exporting country, or when . . . such sales do not permit a proper comparison." Sales made through affiliates are "sales" under the AD Agreement as much as sales made directly to non-affiliates. Where such home market sales are available, Article 2.1 requires their use. To read the Agreement otherwise would allow respondents to eliminate home market sales whenever they chose -- for whatever reason -- to make their home market sales in the ordinary course of trade *through* affiliates.

15. The closest the Panel came to analyzing the text of Article 2.1 was the observation (at ¶ 7.117) that "it is by no means clear" that normal value may be derived from downstream sales in the home market. This approach violates Article 17.6 of the Agreement, which requires the Panel to defer to permissible interpretations by investigating authorities, not to reject interpretations it does not regard as "clearly" correct.

16. Having thus passed lightly over the text of Article 2.1, the Panel then adopted Japan's analysis of the broader context of Article 2 to reach the conclusion that normal value may not be based on downstream sales. A brief consideration of this analysis reveals that Japan has completely misinterpreted Article 2 of the Agreement.

17. Japan argues (at ¶ 44) that Article 2.3:

> provides specific authority to construct a downstream price on the export side, making the absence of such authority on the home market side noteworthy.

Both the premise and the conclusion of this argument are wrong. Article 2.3 does *not* provide authority to "construct a downstream price." Quite the opposite - - Article 2.3 addresses export prices that are, *to begin with*, downstream prices charged by affiliated parties. It provides authority to *deconstruct* these downstream prices, turning them into (or "constructing") the first-stage export prices that would have been charged to independent purchasers in the export market. Moreover, the absence of authority to deconstruct resale prices by affiliated parties in the home market in the same manner as in the U.S. market does not indicate that normal value may not be based on resales by affiliates in the home market – only that such prices are not deconstructed in the same way.

18. The lack of identical "deconstruction" authority for home market resales makes perfect sense in the context of Article 2.4. Article 2.4 provides a "level of trade" adjustment that specifically addresses any difference in the stage of distribution that may exist because first-stage sales in the export market are compared to second-stage (or "downstream") sales in the home market. Article 2.4 provides that, when normal value is being compared to a constructed export price, investigating authorities shall establish normal value at a level of trade "equivalent" to the level of trade of that price, or shall make "due allowance" for the difference. This "due allowance" is required *primarily* where the home market sales were made at a more advanced stage of distribution than export price (constructed or otherwise). In short, the level of trade adjustment provided by Article 2.4 *primarily* addresses the situation where downstream resales in the home market are compared to upstream sales in the export market. This is an unequivocal indication that normal value can be based on resales by affiliated parties in the home market.

19. Instead of seriously analyzing Article 2, the Panel (at ¶ 7.114) relied on language in Article 6.10 that provides no support for its conclusion. Article 6.10 states that investigating authorities should determine an "individual margin of dumping for each known exporter or producer." From this, the Panel reached the unsupported conclusion that such "individual margins" may not be based on sales by individual producers through their affiliates in the home market. This is erroneous, given that there is no dispute that "individual margins" may be based on sales by those individual producers through their affiliates in the export market.

20. Japan now admits (at ¶ 54) that the Panel erred in finding that the Department failed to make adjustments to compensate for the deductions made in constructing export prices (see U.S. submission at ¶¶ 58-60). Instead, Japan now argues (at ¶ 56) that level of trade adjustments do not cover any difference in profit between first and second-stage sales in the home market. This is incorrect. Level of trade adjustments are based on the difference in prices between the two levels of trade and thus include any difference in the profit component of those prices (US submission at ¶ 60 n. 77).

21. Japan seeks to confuse the issue (at ¶¶ 56-57) by attacking the Department's level-of-trade methodology and arguing a factual point about whether the record reflects NKK's request, or lack thereof, for a level-of-trade adjustment. The record establishes (at ¶ 60 n. 78) that the Department conducted detailed level-of-trade analyses for all three Japanese producers. If Japan had wanted to challenge the Department's level-of-trade practice or the application of that practice in this case, it could have done so. Because Japan did not include such a claim in its panel request, the Panel did not rule on that issue and the Appellate Body should not address it.

22. The third issue involves the **application of the facts available to NSC, NKK and KSC**. Japan has argued (at ¶¶ 60, 77) that these issues are solely questions of fact, such that the Appellate Body need not reach them. This is not correct. Both the Panel's decision that the Department could not reject NSC and NKK's untimely-provided weight conversion factors (at ¶¶ 7.55, 7.57) and its decision that the Department could not apply an adverse inference in assigning a margin for KSC's U.S. sales through its 50%-owned affiliate CSI (at ¶¶ 7.73-74) were based on broad legal interpretations with significant potential to undermine both the text of the Agreement and effective enforcement of antidumping laws.

23. With respect to **the question involving NSC and NKK**, the broad legal issue is whether the Agreement permits enforcement of reasonable, pre-established deadlines. The Panel's decision (at ¶ 7.54-55) appears to impose Japan's interpretation (see ¶ 65-69) that pre-established deadlines are inherently unreasonable and that a respondent may, with impunity, provide requested data whenever it chooses, as long as the data can be verified and used. The Panel and Japan have failed to recognize that the pre-established deadlines in this case, which vastly exceeded the minimum time provided for by the Agreement (and which were extended twice), were, in fact, reasonable.

24. Japan claims (at ¶ 72) that the United States seeks to avoid the facts in this case, and that those facts support the Panel's findings. Just the opposite is true. Our submissions (1st sub., Part B, at ¶ 25-27; 2nd sub. at ¶ 22) demonstrated that NSC and NKK repeatedly ignored requests for the weight conversion data, never alleged that they had insufficient time to produce these data, and finally provided the data within days after the preliminary determination showed that the Department was not going to ignore this omission.

25. The legal test the Panel has established for what constitutes a "reasonable period" under Article 6.8 lacks any support. The Panel's definition of "any time that allows for verification and use" is not provided for by the Agreement.

26. Annex II, Para. 3, requires that information be timely, and also verifiable and able to be used without undue difficulty. Japan asserts (at ¶ 70) that the additional requirements "define the meaning . . . of 'reasonable' and 'timely.'" These additional requirements do not override the timeliness requirement. Thus, the Panel was not free to adopt an interpretation that would nullify the independent timeliness requirement of Annex II.

27. Finally, Japan (at ¶ 74) relies heavily on the fact that the amount of data at issue here was "minor." If the amount of missing data was minor, however, the amount of facts available used was also minor. The principle at issue here is not minor, and we trust that the Appellate Body will give it the serious consideration it deserves.

28. With regard to the **facts available claim concerning KSC**, Japan (at ¶¶ 81-92) advances a lopsided interpretation of the term "cooperate" as used in paragraph 7 of Annex II of the AD Agreement. That provision requires that "if an interested party does not *co-operate* . . . , this situation could lead to a result which is less favourable to the party than if the party did *co-operate*" (emphasis added). As Japan explains (at ¶ 80), the Panel relied on the dictionary meaning of cooperate: to "work together for the same purpose or in the same task." Yet Japan, like the Panel, fails to focus on the proper meaning of the first word in that definition – "work." Work requires effort -- real, meaningful effort, not just empty gestures. Japan also fails to acknowledge that the way in which respondents cooperate in investigations is by supplying necessary information. As the United States has stressed (at ¶¶ 71, 75), KSC failed completely to

take the real, meaningful, concrete actions which it could have taken to make a serious effort to obtain the necessary information from its affiliate, CSI.

29. Moreover, Japan ignores completely the incredible factual conclusion which the Panel drew from KSC's failure to exercise its rights under the Shareholders' Agreement: "such actions would have inevitably disrupted the on-going business relationships of the three companies [KSC, CSI, and CVRD]." Panel Report at ¶ 7.73. As we pointed out (at ¶¶ 72, 78), there are no facts on the record to support the Panel's finding on this critical point. Instead, Japan once again claims (at ¶ 88) that taking any serious action – "working" – would not have been worthwhile, because CSI was a petitioner and CVRD's parent was CSN, a competitor of KSC in the U.S. market. KSC's assumption that any serious effort would have been futile does not transform its inaction into cooperation. Because KSC failed to cooperate in obtaining the requested information from CSI, the Department's partial application of facts available to KSC was proper under Article 6.8 and Annex II, paragraph 7.

30. We now turn to Japan's appeal concerning the injury determination of the U.S. International Trade Commission. First, the Panel correctly construed **the nature of the USITC's obligation under Article 3.5 of the AD Agreement to ensure that injury caused by other factors was not attributed to the dumped imports.** It also correctly found that the USITC adequately examined other potential causes of injury and did not attribute any injury caused by those factors to dumped imports.

31. The Panel's discussion included a careful analysis of both the text of Article 3.5 and the pertinent portions of the USITC opinion which discussed, in detail, both the causal link between dumped imports and injury and other causes of injury. The Panel emphasized that under Article

3.5 "the authority is to examine and ensure that these other factors do not break the causal link that appeared to exist between dumped imports and material injury. . . ." The Panel also observed that the non-attribution standard of Article 3.5 was the same as that found in Article 3:4 of the Tokyo Round AD Code.

32. Consequently, the Panel appropriately referred to the GATT Panel Report in *Atlantic Salmon*, which construed Article 3:4 of the AD Code, for "persuasive and relevant" guidance on the appropriate interpretation of Article 3.5 of the AD Agreement. *Atlantic Salmon* expressly rejected the notion that the non-attribution provision of the AD Code required investigating authorities to isolate injury caused by other factors from the injury caused by dumped imports. Instead, *Atlantic Salmon* reasoned, the investigating authority was required to examine the other factors sufficiently to ensure that in its analysis of the volume, price effects, and impact of dumped imports, the authority was not attributing to the dumped imports injury caused by these other factors.

33. Japan does not argue that the Panel misunderstood *Atlantic Salmon*. Rather, it contends that the Panel should not have applied the analysis in that report. There is no basis for Japan's arguments.

34. There were no changes in the language of the AD Agreement that would serve to call the *Atlantic Salmon* panel's analysis into question. To the contrary, as the Panel here found, the non-attribution language from the Tokyo Round Code that *Atlantic Salmon* interpreted is essentially identical to the language now in Article 3.5. Moreover, as we explained in detail in our Appellee Submission, the language in Article 3.5 closely tracks the analysis of *Atlantic Salmon*.

35. Specifically, both Article 3.5 and *Atlantic Salmon* distinguish the nature of analysis an investigating authority must conduct with respect to dumped imports from the analysis it must conduct with respect to other factors. The first two sentences of Article 3.5 require an authority to "demonstrate" that dumped imports are causing injury. By contrast, the third sentence of Article 3.5 adopts the *Atlantic Salmon* interpretation that authorities need only "examine" factors other than the dumped imports. Both the *Atlantic Salmon* report and the text of Article 3.5 support the conclusion that the demonstration requirement for dumped imports is different in nature from the examination requirement for other factors.

36. There is no basis for Japan's position that the Appellate Body's reports in the *Wheat Gluten* and *Lamb Meat* disputes rejected *Atlantic Salmon*. The *Wheat Gluten* and *Lamb Meat* disputes arose under the Safeguards Agreement. The Appellate Body was not called on and did not purport to construe the AD Agreement in those disputes. To the contrary, in its discussion of Article 4.2 of the Safeguards Agreement in *Lamb Meat,* the Appellate Body observed that Article 17.6(ii) of the AD Agreement establishes a particularized standard of review in antidumping proceedings. This provision requires a panel to uphold an authority's interpretation of the Agreement if it is "permissible." The Appellate Body also indicated that there is a more stringent standard of injury in safeguards matters than antidumping or countervailing duty matters. There is consequently no basis for Japan simply to assume that *Wheat Gluten* and *Lamb Meat* are applicable in the antidumping context.

37. Japan's assumption is further undermined by differences between Article 4.2 of the Safeguards Agreement and Article 3.5 of the AD Agreement. First, the AD Agreement specifically uses the word "examine" to describe the analysis that investigating authorities should

conduct of factors other than dumped imports. As we have already explained, this word is different from the one -- "demonstrate" -- that Article 3.5 uses to describe the analysis that investigating authorities should use in determining whether dumped imports are causing injury. By contrast, Article 4.2(b) of the Safeguards Agreement does not use specific verbs to describe the nature of the authority's analysis of factors other than the imports under investigation. Nor does its language distinguish the nature of the authority's analysis of other causes from its analysis of the imports under investigation.

38. The second difference concerns the first sentence of Article 3.5 of the AD Agreement, which instructs authorities to demonstrate that dumped imports are causing injury by reference to the factors listed in Articles 3.2 and 3.4. Articles 3.2 and 3.4 provide detailed direction to investigating authorities to examine an array of performance factors, including but not limited to increased import volumes and price effects, to ascertain whether dumped imports are having a full range of effects on the domestic industry. By contrast, Article 4.2 of the Safeguards Agreement does not contain similarly detailed instructions. It does not specify how injury and causation analysis is to be performed nor does it indicate to what specific inquiries the factors it lists are pertinent.

39. Third, as described in our submission, the Safeguards and AD Agreements have different objects and purposes and very different negotiating histories. Work on the substantive injury portions of the Safeguards Agreement was completed by 1991. By contrast, when the report in *Atlantic Salmon* was issued in late 1992, the text of Article 3 of the AD Agreement had not yet been finalized. Had the negotiators of the AD Agreement intended to require the isolation of the various causes of injury, and thus a more exacting standard for the examination of other causes

than that required by *Atlantic Salmon*, they would have done so expressly rather than using the language that incorporated the analysis used in the report. Further, the GATT Committee on Anti-Dumping Practices adopted the *Salmon* report on April 27, 1994, after the text of the AD Agreement had been finalized.

40. The Panel below was therefore entirely correct in finding *Atlantic Salmon* to be "relevant" and "persuasive" in articulating the appropriate causation standard under Article 3.5 of the AD Agreement. And the Panel properly applied this standard to conclude that the USITC had sufficiently examined each of the alternative causes of injury now identified by Japan. As the Panel found, the USITC's opinion directly examined alleged causes of material injury other than dumped imports. These included internal competition due to minimills, the General Motors strike, changes in demand patterns, and nonsubject imports. The USITC found that these factors either did not explain the nature of the injury experienced by the domestic industry or simply were not a cause of injury. Consequently, the Panel's conclusion that the USITC satisfied its obligations under Article 3.5 of the AD Agreement should be affirmed.

41. With respect to the second injury issue Japan raises in its cross-appeal, the Panel correctly concluded that **the "captive production" provision** of U.S. antidumping law does not violate Articles 3 or 4 of the AD Agreement. U.S. law imposes the same obligation on the USITC that the AD Agreement imposes on the United States: that injury be assessed on the domestic industry as a whole. Under U.S. law, the USITC must consider in all antidumping investigations, among other factors, the market share and financial performance of the industry as a whole and must analyze whether the industry as a whole is injured by imports under investigation.

42. The "captive production" provision does not change or eliminate this obligation. Its instruction that the USITC "focus primarily" on the industry's market share and financial performance in the merchant market, as the Panel found, does not require the USITC to assign any particular weight or emphasis to the merchant market performance, much less to focus exclusively on the merchant market or disregard the performance of the industry as a whole.

43. Although the "captive production" provision does contemplate that the USITC conduct, to some extent, a sectoral analysis of the pertinent domestic industry, this is entirely consistent with Articles 3 and 4 of the AD Agreement. The Panel here correctly referenced the Panel report in *High Fructose Corn Syrup*, which explained that nothing in the AD Agreement precluded a sectoral analysis of the industry or market. Furthermore, a sectoral analysis can, in some circumstances, yield a better understanding of the effects of dumped imports.

44. Here, the captive production provision provides an analytical tool that enhances the USITC's ability to consider "all relevant economic factors and indices having a bearing on the state of the industry," as required by Article 3.4 of the AD Agreement. When an industry engages in significant captive consumption, a substantial amount of the domestic industry's production may be shielded from competition with the dumped imports. Nonetheless, if a significant part of the industry's production is destined for the merchant market as well, the adverse impact of imports in the merchant market may have a material adverse impact on the *overall* state of the industry. As a result, when it is applicable, the provision acts to ensure that the USITC will closely and fully examine the very part of the market in which import competition is occurring, as a means of assessing its impact on the industry as a whole.

45. The captive production provision thus provides a mechanism to direct the USITC to analyze the industry as it actually operates, both with respect to sectors where competition with imports may be most intensive and with respect to sectors where the domestic industry may be shielded from import competition. The provision does not require the USITC to make a determination based solely on data inherently unfavorable to foreign producers, nor does it prevent the USITC from relating its findings concerning the merchant market to overall data for the industry.

46. As the Panel correctly concluded, the captive production provision does not relieve the USITC of its obligation under the Agreement to assess injury with respect to the industry as a whole. Instead, the provision simply requires the USITC to conduct an additional step in its injury analysis that will allow it to make the sort of detailed injury analysis that is consistent with the provisions of the AD Agreement. Consequently, the Panel's conclusion that the "captive production" provision is consistent with the AD Agreement should be affirmed.

47. This concludes our statement.